No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JAMES ARTHUR "ART" POPE, *et al.*,

Appellants,

v.

JAMES B. HUNT, JR., *et al,*

Appellees,

and

RALPH GINGLES, *et al.*

Appellees.

Appeal from the United States District Court
Eastern District of North Carolina, Raleigh Division

JURISDICTIONAL STATEMENT

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November 21, 1994

37 pp

QUESTIONS PRESENTED

I. Did the district court attribute insufficient relevance to the configuration of the challenged congressional districts in light of this Court's admonition in *Shaw* v. *Reno* that "Reapportionment is one area in which appearances do matter"?

II. Did the district court err in applying a remedial standard under Section 2 of the Voting Rights Act when the redistricting plan in question was not remedial in nature?

III. Does the failure of North Carolina's congressional redistricting statute to meet the geographic compactness requirements of *Thornburg* v. *Gingles* vitiate the district court's reliance on Section 2 as a compelling state interest?

IV. Does the district court's disregard of *Gingles* compactness requirement result in prohibited proportional representation?

V. Did the district court err in failing to shift the burden of proof to the State to proffer a legitimate, nonracial explanation for the irrationally shaped districts in the challenged plan?

THE PARTIES

JAMES ARTHUR "ART" POPE, BETTY S. JUSTICE, DORIS LAIL, JOYCE LAWING, NAT SWANSON, RICK WOODRUFF, J. RALPH HIXON, AUDREY McBANE, SIM A. DELAPP, JR., RICHARD S. SAHLIE and JACK HAWKE, individually, are appellants in this case and were plaintiff-intervenors below;

RUTH O. SHAW, MELVIN G. SHIMM, ROBINSON O. EVERETT, JAMES M. EVERETT, and DOROTHY G. BULLOCK, are appellants in *Shaw* v. *Hunt*, filed concurrently with this appeal, and were plaintiffs below;

JAMES B. HUNT, in his official capacity as Governor of the State of North Carolina, DENNIS A. WICKER, in his official capacity as Lieutenant Governor of the State of North Carolina and President of the Senate, DANIEL T. BLUE, JR., in his official capacity as Speaker of the North Carolina House of Representatives, RUFUS L. EDMISTEN, in his official capacity as Secretary of the State of North Carolina, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, an official agency of the State of North Carolina, EDWARD J. HIGH, in his official capacity as Chairman of the North Carolina State Board of Elections, JEAN H. NELSON, in her official capacity as a member of the North Carolina State Board of Elections, LARRY LEAKE, in his official capacity as a member of the North Carolina State Board of Elections, DOROTHY PRESSER, in her official capacity as a member of the North Carolina State Board of Elections, and JUNE K. YOUNGBLOOD, in her official capacity as a member of the North Carolina State Board of Elections, are the appellees in this case and were defendants below;

RALPH GINGLES, VIRGINIA NEWELL, GEORGE SIMKINS, N. A. SMITH, RON LEEPER, ALFRED SMALLWOOD, DR. OSCAR BLANKS, REVEREND DAVID MOORE, ROBERT L. DAVIS, C. R. WARD, JERRY B. ADAMS, JAN VALDER, BERNARD OFFERMAN, JENNIFER McGOVERN, CHARLES LAMBETH, ELLEN EMERSON, LAVONIA ALLISON, GEORGE KNIGHT, LETO COPELEY, WOODY CONNETTE,

ROBERTA WADDLE and WILLIAM M. HODGES, are appellees in this case and were defendant-intervenors below.

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Appellees.

Appeal from the United States District Court
Eastern District of North Carolina, Raleigh Division

JURISDICTIONAL STATEMENT

In this congressional redistricting case, appellants (plaintiff-intervenors below) appeal from the final judgment and divided opinions of the United States District Court for the Eastern District of North Carolina, Raleigh Division, sitting as a three-judge court.

OPINIONS BELOW

At the time of the printing of the Appendix hereto, but before the printing of the Jurisdictional Statement, the August 1, 1994 judgment of the three-judge court, as well as the court's supplemental orders and amended opinion, were not yet officially reported, and are set out in the accompanying Appendix as indicated as follows at pages 1a to 154a.[1] Shortly before the

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[1] After meeting and consultation with the Clerk of this Court, plaintiffs and plaintiff-intervenors determined that they would file separate jurisdictional

printing of this Jurisdictional Statement, the district court's amended opinion was officially reported at 861 F. Supp. 408 (E.D.N.C. 1994).

JURISDICTION

Jurisdiction of this appeal is conferred on this Court by 28 U.S.C. § 1253.

In an order issued on August 1, 1994 the three-judge district court reserved the right to amend its ruling until August 22, 1994. App. B at 4a. Plaintiffs filed on August 15, 1994 a Motion to Amend and Add Findings Pursuant to Rule 52(b) of Fed. R. Civ. P.

On August 18, 1994 plaintiff-intervenors filed a timely notice of appeal from the August 1 ruling. App. F at 161a.

On August 22, 1994 the district court issued an amended opinion which included at least 26 significant, mostly substantive changes from its August 1 opinion. App. C at 6a.

Plaintiffs in this case filed a notice of appeal from the court's amended opinion on August 29, 1994, App. E at 157a, and plaintiff-intervenors filed a supplemental notice on September 16, 1994.[2] App. F at 163a.

On September 1, 1994 the district court issued an order denying the plaintiffs' motion to amend and add findings. In addition to denying plaintiffs' motion, the court included observations respecting the status of stipulated facts of record.

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statements but, to eliminate unnecessary duplication, would prepare and jointly file a single appendix to both jurisdictional statements. Plaintiff-intervenors will be filing this appendix in connection with their jurisdictional statement.

[2] Plaintiff-intervenors filed their second notice of appeal by mail on August 31, 1994. Upon inquiry to the Clerk's office, no record could be found of the receipt of that notice. As a precaution, plaintiff-intervenors hand filed a replacement notice, which was filed stamped by the Clerk on September 16, 1994.

Chief Judge Voorhees dissented from the majority's denial of the motion. App. D at 155a.

On September 15, 1994 plaintiffs filed a supplemental notice of appeal "from all rulings and Orders entered by the three-Judge District court in support of, or in connection with, the Final Judgment, including [the] order dated September 1, 1994. App. E at 159a. Plaintiff-intervenors filed a similar supplemental notice of appeal on September 21, 1994. App. F at 165a.

Because of the extraordinary circumstances of the original opinion, the amended opinion, the order denying the motion to amend and add, and the five notices of appeal filed by plaintiffs and plaintiff-intervenors (two by plaintiffs and three by plaintiff-intervenors), plaintiffs and plaintiff-intervenors sought a determination that the 60-day period for filing both jurisdictional statements, together with the joint single appendix to the jurisdictional statements run to November 21, 1994. In orders in A-252 (*Pope* v. *Hunt)* and A-253 (*Shaw* v. *Hunt)*, on October 13, 1994 the Chief Justice extended the time for filing both jurisdictional statements to November 21, 1994.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The principal statutory and constitutional provisions involved in this case are:

(a) Section 1 of the fourteenth amendment to the Constitution of the United States which provides, in pertinent part: "No person shall deprive any persons of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;" and

(b) The fifteenth amendment to the Constitution of the United States which provides, in pertinent part: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude;"

(c) article I, section 2 of the Constitution of the United States, which provides, in pertinent part: "The House of Representatives shall be composed of Members chosen every second year by the people of the several States . . ."

(d) article I, section 4 of the Constitution of the United States, which provides, in pertinent part: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . .;"

(e) Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973(b) (1982), which provides, in pertinent part:

> [Based] on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected] class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(f) Chapter 7 (1991) (Extra Session) (hereinafter "Chapter 7"), the challenged congressional redistricting statute involved, which amends North Carolina Elections Code Chapter 163, article 17. Chapter 7 is reproduced and appended hereto as Appendix H.

STATEMENT OF THE CASE

Appellants' complaint below sought preliminary and permanent injunctive relief against the enforcement of North Carolina's congressional redistricting statute, pursuant to 28 U.S.C. §§ 1331, 1343(3) & (4), 1361, 42 U.S.C. §§ 1983 and

1988, 2 U.S.C. § 2 and 28 U.S.C. §§ 2201 and 2202. A three-judge court was convened pursuant to 28 U.S.C. 2284(a).

After dismissal of the original plaintiffs' claims in this matter, *Shaw* v. *Barr*, 808 F. Supp. 461 (E.D.N.C. 1992), the plaintiffs appealed to this Court which, in *Shaw* v. *Reno*, ___ U.S. ___, 113 S.Ct. 2816 (1993), held that the plaintiffs had stated a claim under the Equal Protection Clause by alleging that the North Carolina General Assembly had adopted a redistricting plan that was "so irrational on its face that it can be understood only as an effort to segregate voters into voting districts because of their race, and that the separation lacks sufficient justification." *Id.* at ___, 113 S.Ct. at 2832.

This Court reversed the district court's dismissal of the plaintiffs' Equal Protection claim and remanded that claim for further consideration. *Id.*

Upon remand, the district court permitted appellants herein — eleven persons registered to vote as Republican in North Carolina — to intervene as plaintiffs (the plaintiff-intervenors) on the condition that they adopt as their own the amendment complaint filed by the original plaintiffs.[3]

A trial was held from March 28, 1994 through April 4, 1994. The district court ruled on August 1, 1994 (as amended on August 22, 1994) that the challenged congressional redistricting scheme for North Carolina was not unconstitutional and dismissed on the merits the challenge of plaintiffs and plaintiff-intervenors to the plan. While the district court explicitly found that the plan's lines were indeed a racial gerrymander subject to strict scrutiny under *Shaw*, it held that the plan was nonetheless narrowly tailored to further the state's compelling interest in complying with the Voting Rights Act.

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[3] To the extent that the statement of the case in the jurisdictional statement of plaintiff-appellants in *Shaw* v. *Hunt*, being filed concurrently with this jurisdictional statement, supplements this statement, the *Pope* appellants incorporate that statement by reference.

Senior Circuit Judge Phillips delivered the opinion of the court, in which District Judge Britt joined. Chief District Judge Voorhees filed an opinion concurring in part and dissenting in part.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. THE MAJORITY BELOW ERRED IN REFUSING TO GIVE SUFFICIENT EMPHASIS TO THE CONFIGURATIONS OF THE CHALLENGED DISTRICTS

In *Shaw* v. *Reno*, ___ U.S. ___, 113 S.Ct. 2816 (1993) this Court held that "a plaintiff challenging a [redistricting] plan under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." *Id.* at ___, 113 S.Ct. at 2828. Because the original *Shaw* plaintiffs had made such an allegation in their complaint, this Court recognized they had stated a valid Equal Protection claim.

The district court below characterized its understanding of the general nature of the Equal Protection claim recognized by the Court and remanded for trial: "It is, in effect, the same basis claim that the Court has recognized in other contexts in which race-based remedial measures, or "affirmative action" undertaken by State actors have been challenged, typically by members of the majority race claiming "reverse discrimination." [Citations omitted.] App. C at 19a.

The district court limited the relevance of the bizarre configurations of the districts in question, determining that the shapes of the districts had relevance "only as circumstantial evidence that the disproportionate concentration of members of a particular race in certain districts was something the line-drawers deliberately set about to accomplish, as opposed to being simply an accidental consequence of a line-drawing process driven by other districting concerns." App. C at 34a.

Without justification, the majority arbitrarily limited the criteria for evaluating Chapter 7 to "constitutionally-mandated" redistricting principles, virtually ignoring this Court's explicit recognition of "traditional districting principles such as compactness, contiguity, and respect for political subdivisions" *Shaw*, ___ U.S. at ___, 113 S.Ct. at 2827.

As dissenting Chief District Judge Voorhees has pointed out, the majority's view "ignores the special breed of harms . . . recognized by the Supreme Court in *Shaw*, a breed of harms "analytically distinct" from any associated with the mere intent to discriminate."[4]

This Court underscored those analytically distinct harms in the following way:

> Put differently, we believe that reapportionment is one area in which *appearances do matter*. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.
>
> * * *
>
> Justice Souter apparently believes that racial gerrymandering is harmless unless it dilutes a racial group's voting strength. As we have explained, however, reapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race *injures voters in other ways*.

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[4] "Nothing in [*United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977)] precludes white voters (or voters of any other race) from bringing the analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without some justification." *Shaw*, ___ U.S. at ___, 113 S.Ct. at 2830.

App. C at 117a-18a, *citing Shaw*, ___ U.S. at ___, 113 S.Ct. 2827-32.

As Chief District Judge Voorhees argues in his dissent, at least in the context of racial gerrymanders, the configuration of districts is relevant to the question of discriminatory effects, a notion ignored by the majority below. "To dismiss the relevance of district shape from our inquiry otherwise is to ignore the Supreme Court's mandate in this particular case." App. C at 121a.

The geographic basis of representation in the House of Representatives is founded on the notion that representatives should be linked in some significant way to the interests of the community they represent. This close affinity between the representative and the represented was central to the Founders' intent in creating the House of Representatives:

> As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration [the House of Representatives] should have an immediate dependence on, and an intimate sympathy with, the people."

The Federalist No. 52 at 329 (J. Madison or A. Hamilton)(Henry Cabot Lodge ed. 1892).

In the geographic nature of our representational system, appearances do matter. A representative elected from districts like those in question is neither immediately dependent upon nor in intimate sympathy with the voters, for the diversity of interests and communities within these districts makes such intimacy problematic.

II. THE DISTRICT COURT ERRED IN ACCEPTING THE STATE'S USE OF THE VOTING RIGHTS ACT AS JUSTIFICATION FOR THE DISTRICTS IN QUESTION

The district court concluded that the State had "a 'compelling' interest in engaging in race-based redistricting to give effect to minority voting strength whenever it has a 'strong basis in evidence' for concluding that such action is 'necessary' to prevent its electoral districting scheme from violating the Voting Right Act." App. C at 45a.

As noted by Chief District Judge Voorhees in his dissent, the "primary justification proffered by the State for its redistricting plan, on which the majority here entirely relies, is its statutory duty to comply with the Voting Rights Act." App. C at 121a.

While the States "certainly have a very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and as applied," *Shaw*, ___ U.S. at ___, 113 S.Ct. at 2830, the State must, at the very least, demonstrate that "it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been [some violation of the Voting Rights Act]." *Wygant* v. *Jackson Bd. of Education*, 476 U.S. 267, 277 (1986). In other words, the trial court must make a factual determination that the State "had a strong basis in evidence for its conclusion that remedial action was necessary." *Id.*

In this case, the challenged congressional redistricting plan is the result of a theory of maximization of minority voting strength promoted by the appellees which conflicts directly with the judgment of the Congress and the Supreme Court that Section 2 of the Voting Rights Act is a remedial statute whose use or application must be preceded by certain threshold preconditions. In the absence of such proof — which appellees cannot produce — the remedial processes of Section 2 cannot be employed.

A. Even if Section 2 Were Relevant, the Challenged Plan Fails to Meet This Court's Preconditions of Compactness, Rendering Further Justification Under Section 2 Misplaced

This Court's recent decision in *Voinovich* v. *Quilter*, ___ U.S. ___, 113 S.Ct. 1149 (1993) confirms that, at a minimum, parties seeking to invoke the protection of Section 2 must first prove that a challenged redistricting plan denies them equal opportunity: "Only if a reapportionment scheme has the effect of denying a protected class the *equal* opportunity to elect the candidate of choice does it violate § 2. *Where such an effect has not been demonstrated, § 2 simply does not speak to the matter.*" *Id.* at 1156 (emphasis added). In this case, such an effect *cannot* be demonstrated.

For Section 2 to be legally relevant to this case, it would have to be in an entirely different posture. A Section 2 analysis is only appropriate in a remedial situation where an existing redistricting plan is challenged as denying the protected class equal electoral opportunity. Appellees are factually and legally precluded from ever getting to such a remedial situation, because they cannot satisfy the requirements of *Gingles* with respect to equal opportunity.

Assuming, for the sake of argument, that Section 2 is applicable in a *non-remedial* situation, it cannot be used to justify the redistricting plan at issue because it does not meet the minimal requirements for proof of a Section 2 violation set out by the Supreme Court in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), preconditions reaffirmed by this Court recently in *Voinovich*, *supra*, and *Growe* v. *Emison*, ___ U.S. ___, 113 S. Ct. 1075 (1993).

In *Gingles*, this Court devised a test for evaluating whether plaintiffs challenging multimember districts had made a threshold showing of unequal electoral opportunity:

> First, they must show that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district." Second, they must prove that the minority group is "politically cohesive."

> Third, the plaintiffs must establish "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."

See Voinovich v. *Quilter*, ___ U.S. at ___, 113 S. Ct. at 1157 (summarizing the *Gingles* threshold test for multimember districts). It is now clear that the *Gingles* preconditions are also applicable to single-member district cases. *Growe*, ___ U.S. at ___, 113 S. Ct. at 1084; *Voinovich*, ___ U.S. at ___, 113 S. Ct. at 1157. As the Supreme Court stated in *Growe*:

> The "geographically compact minority" [showing is] needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district . . . . Unless these points [i.e. the three preconditions] are established, *there neither has been a wrong nor can be a remedy.*

___ U.S. at ___, 113 S. Ct. at 1084; *See also Gingles*, 478 U.S. at 50, n. 17 (emphasizing the threshold need for a minority group to prove that "it is *sufficiently large and geographically compact* [in order to] possess the *potential* to elect representatives.") (Emphasis added.)

It is elemental that proponents of a Section 2 analysis must prove the existence of the *Gingles* preconditions. They cannot be assumed. *Growe*, ___ U.S. at ___, 113 S.Ct. at 1085; *Gingles*, 478 U.S. at 46.

The appellees' theory of this case should have been foreclosed as a matter of law because it effectively reads the first *Gingles* requirement — "geographic compactness" — out of the law. The *Gingles* compactness requirement must be understood as a rejection of the theory of "virtual" representation advanced by the appellees. This Court could have chosen to interpret Section 2 to require that districts could be drawn elsewhere in a State if a minority population was not sufficiently numerous and compact; or it could have required states to draw non-contiguous districts to combine disparate minority population centers.

This Court's explicit and definitive choice of the compactness requirement quite properly recognizes that Section 2 was not intended to invalidate traditional geographic-based representation on which all Sta and federal legislative bodies are fundamentally premised.

B. The Failure to Meet Any One of the *Gingles* Threshold Preconditions Obviates the Permissible Use of a Section 2 Justification

Once it has been determined that the defendants cannot, in fact, meet the threshold requirement of geographic compactness under *Gingles*, any claim that Section 2 justifies the districts in question falls flat, and the inquiry under Section 2 must be terminated.

This is precisely the argument made recently by the Solicitor General of the United States, and relied upon by this Court in vacating a district court decision in *Statewide Reapportionment Advisory Committee* v. *Theodore ("SRAC")*, ___ U.S. ___, 113 S. Ct. 2954 (1993). The U.S. Department of Justice — through the Solicitor General — made the following argument to the Court:

> The district court purported to apply the three fundamental requirements identified in *Gingles* — size and compactness of minority concentrations, minority political cohesiveness, and majority bloc voting — so as to "insur[e] that the court's plan [would] not violate the threshold requirements for liability under § 2." *Properly applied, that approach might be an appropriate way for a court to avoid an unnecessarily extensive Section 2 inquiry.* If, for example, the court had found that voting in South Carolina elections was not racially polarized, any Section 2 claim would have been destined to failure under *Gingles*, and *there would have been little point in taking other evidence or making other findings relevant to such a claim.*

Brief for the United States as Amicus Curiae at 12 in *SRAC*. (Citations omitted; emphasis added). The Justice Department further argued that "the district court did not respond adequately to

the question whether additional compact and contiguous districts with black majorities could and should have been created in disputed areas . . ." *Id.* at 13.[5]

This Court accepted the Justice Department's argument, and vacated the district court's decision with the following *per curiam* order:

> The judgment is vacated and the cases are remanded to the United States District Court for the District of South Carolina for further consideration in light of the position presented by the Acting Solicitor General in his brief for the United States filed May 7, 1993.

SRAC, ___ U.S. ___, 113 S. Ct. 2954 (1993).

Although this is not, as was the case in *SRAC*, a remedial action under Section 2, appellants agree with the view taken in that case by the Department of Justice and endorsed by the Supreme Court that ends any Section 2 inquiry upon a determination that one of the *Gingles* preconditions has not and cannot be met.

C. If There Was Any Problem to Remedy, The Only Relevant Counties Should Be the Counties Covered Under Section 5 of the Voting Rights Act

While, in certain circumstances, it may arguably be necessary to configure districts which would more nearly assure the election of minority candidates, this is not a remedy which has been generally applied to jurisdictions not covered by Section 5.

The use of the *Gingles* preconditions to identify additional single-member districts that hypothetically could be drawn does not answer the question of whether potential plaintiffs are denied equal electoral opportunity. Equal electoral opportunity is not denied

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[5] The Solicitor General made a similar argument to the Supreme Court in a case arising out of a district court in Minnesota, arguing that the district court in *Growe* had erred by failing to apply the *Gingles* preconditions. Brief for the United States as Amicus Curiae at 8-16, in *Growe* v. *Emison, supra.*

merely because a redistricting fails to maximize the electoral opportunities of a minority class. Rather, whether the single-member districts in a challenged area deny equal electoral opportunities to a minority class depends in part on *how many districts in the relevant geographic area* afford that class an opportunity to elect its preferred candidates. Any relevant proof must be co-extensive with the geographic area in which vote dilution is alleged. *See Brown* v. *Thomson*, 462 U.S. 835, 846 & n.9 (1983).[6] *Cf. also Johnson* v. *DeGrandy*, ___ U.S. at ___, 113 S.Ct. at ___ (1994).

Appellants maintain that, because this case was never a remedial action under Section 2 of the Voting Rights Act, the only relevant geographic areas would be in those counties covered by the preclearance provisions of Section 5 of the Act (40 of North Carolina's 100 counties). Only 24 covered counties are included in whole or part in districts 1 and 12, while those districts include all or parts of 14 uncovered counties.

It may be that over-zealousness by the Department of Justice was a contributing explanation for reaching beyond the covered counties, but the Department's jurisdiction — and therefore the appellees' justification — for so doing is not rooted in any authority under the Voting Rights Act.

In 1987, the Department of Justice adopted new administrative regulations which seriously overstepped the Department's jurisdiction under the Act, and led the Department, and ultimately the State of North Carolina, to impute Section 2 into the enforcement of Section 5:

> In those instances in which the Attorney General concludes that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is

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[6] In *Brown*, the Court refused to consider the constitutionality of the State of Wyoming's State legislative apportionment plan outside of Niobrara County because the "Appellants deliberately limited their challenge to the alleged dilution of their voting power" in that county. *Brown*, 462 U.S. at 846.

> necessary to prevent a clear violation of amended Section 2, the Attorney General will withhold Section 5 preclearance.

28 C.F.R. § 51.55(b). These amendments to the regulations make it clear that the Attorney General claims authority to object under Section 5 to plans which, while satisfying the burden of proof under Section 5, would fail under a Section 2 analysis. To the extent that this provision formed the basis of any portion of the Attorney General's objection to Chapter 601, the State's first redistricting plan, and resulted in the creation of majority-minority districts in areas of the State not covered by Section 5, appellants maintain that such action and regulation exceeds the scope of Section 5.

The purpose of Section 5 is to prohibit voting-procedural changes that "lead to a retrogression in the position of racial minorities." *Beer* v. *United States*, 425 U.S. 130, 141 (1976). Properly reinforced, Section 5 should serve as a *shield* against discriminatory laws intended to repeal legitimate gains of voting rights secured by minorities. Section 5 was not intended to be used as a sword by either partisan politicians or advocates of proportional representation. Thus, any redistricting plan "would not be narrowly tailored" to meet the requirements of Section 5 "if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw*, ___ U.S. at ___, 113 S.Ct. at 2831.

Prior to the 1992 redistricting cycle, there was no majority-minority district in the North Carolina Congressional delegation. It is arguable that Section 5 therefore provides no justification for the creation of even a single majority-minority district in North Carolina. Of course, this conclusion would not prevent the State from creating at least one *compact and contiguous* majority-minority district in the State to avoid potential future liability under Section 2 or for other legitimate reasons.

While the Congress remains free to expand the reach of Section 5, that is not a matter made discretionary to the federal courts or the Department of Justice, nor committed to the whims of State officials.

III. THE DISTRICT COURT'S DISREGARD FOR *GINGLES'* COMPACTNESS PRECONDITION IS A THINLY VEILED ACCEPTANCE OF PROHIBITED PROPORTIONAL REPRESENTATION

The appellees' approach — accepted by the district court — rests on a mechanistic assumption that Section 2 requires the maximization of minority electoral opportunity, no matter what the configuration of the district. Implicit in the appellees' disregard for the *Gingles* compactness precondition is the premise that the Voting Rights Act mandates proportional representation.

While the Voting Rights Act prohibits "any redistricting scheme which *minimizes* or dilutes the voting strength of racial minorities," Parker, Racial Gerrymandering and Legislative Reapportionment, MINORITY VOTE DILUTION 86 (C. Davidson, ed. 1984) (citing Robert G. Dixon, Jr., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 460 (1968), it does not require the *maximization* of minority voting strength. Even assuming, arguendo, that maximization is permissible under some circumstances as a *remedy* under the Voting Rights Act, there is no authority to support a conclusion that maximization is mandated by the Act when there has been no finding of a violation of Section 2. Appellants maintain that this Court's determination in *Johnson* v. *DeGrandy*, ___ U.S. ___, 114 S.Ct. 2647 (1994) underscores this assertion.

The Voting Rights Act and its legislative history specifically and properly disclaim any congressional intent to establish any right to have members of a protected class elected in numbers equal to their proportion in the population. 42 U.S.C. § 1973(b) (1982). Nor does the statute require that either the legislature or courts impose a quota system for the election of minorities. To require a legislature to "assume" a Section 2 challenge and therefore apply a Section 2 analysis is, in effect, a quota requirement of proportional representation.

"The task of resolving" the meaning or applicability of Section 2 of the Voting Rights Act "begins where all such inquiries must

begin: with the language of the statute itself." *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). Section 2 says nothing about maximizing the number of districts available to minorities in a redistricting plan. Rather, when a federal court is called upon to determine the relevance of Section 2, it is "required to act in full accordance with the disclaimer in Section 2," SENATE COMM. ON THE JUDICIARY REPORT ON THE VOTING RIGHTS ACT EXTENSION, S. REP. NO. 417, 97th Cong., 2d Sess. (1982) 30[7]: "provided that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b).

Nonetheless, the district court accepted the State's justification for North Carolina's racial gerrymandering plan as necessary to "insulate" the State from the potential of a Section 2 challenge. This approach stands the underlying reasons for Section 2 on their head, and is, in fact, a vehicle for just the sort of proportional representation expressly disclaimed by the Act.

To accept the district court's view of the Act, this Court must accept a view of redistricting that leads to race-based politics, a view which conflicts with fundamental principles of representational democracy. The dangers inherent in such a result were well stated by Justice Douglas in responding to a claim put forth by minority politicians in defense of a racial gerrymander designed to create a safe minority seat:[8]

> The principle of equality is at war with the notion that District A must be represented by a Negro, as it is within the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on.
>
> * * *
>
> When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one becomes

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[7] *Reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 177.

[8] The majority rejected the challenge to the gerrymander for want of proof of racist animus.

> separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.

Wright v. *Rockefeller,* 376 U.S. 52, 66-67 (1964) (Douglas, J., dissenting).

If Congress intended the radical reordering of the nation's political theory that is implicit in appellees' arguments in support of the challenged plan, it could say so explicitly, clearly and directly. It has not. Indeed, as noted above, it explicitly disclaimed such an intention.

There is no self-evident "national interest in creating an incentive to define political groups by racial characteristics," *City of Mobile* v. *Bolden,* 446 U.S. 55, 89 (1980) (Stevens, J., concurring). This Court should not endorse a maximization requirement in the face of an explicit Congressional disclaimer of any intent to create any political quota system for any group or protected class.

As this Court noted last Term in *Johnson* v. *DeGrandy*, 512 U.S. ___, 114 S.Ct. 2647 (1994), "Failure to maximize cannot be the measure of § 2." *Id.* at 1994 U.S. LEXIS 5082 [*36 temporary pagination].

> It bears recalling, however, that for all the virtues of majority-minority districts as remedial devices, they rely on a quintessentially race conscious calculus aptly described as the "politics of the second best," *see* B. Grofman, L. Handley, & R. Niemi, MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 136 (1992). If the lesson of *Gingles* is that society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need

> to be a majority within a single district in order to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul and trade to find common political ground . . . .

Id. at [*42 temporary pagination].

IV. THE DISTRICT COURT ERRED IN CONCLUDING THAT NORTH CAROLINA'S CONGRESSIONAL REDISTRICTING PLAN WAS NARROWLY TAILORED TO FURTHER A COMPELLING STATE INTEREST

A. Plaintiff-Intervenors' More Compact Alternative Redistricting Plan Demonstrated That A More Narrow Tailoring Was Possible

At trial, plaintiff-intervenors submitted an alternative congressional redistricting plan that showed it possible to create two majority-minority districts in North Carolina that were far more narrowly tailored than those in Chapter 7.

The State made the disingenuous argument — which the district court accepted — that the submission of an alternative redistricting plan with geographically more compact districts in itself demonstrated the State's potential liability under Section 2, thereby providing the State with the requisite compelling interest. App. C at 74a-75a n.50.

Dissenting Judge Voorhees takes issue with the majority's contorted logic:

> In what can only be described as a legal leap of faith . . . the State, with the majority's blessing . . . asserts that whatever districts it actually created to preempt liability under the Voting Rights Act need not reflect or incorporate the specific compact minority populations which would allegedly trigger the § 2 violation. This line of contention is

> devoid of both logic and common sense . . . I must conclude that the State "went beyond what was reasonably necessary to avoid [vote dilution]" and that North Carolina's reapportionment plan consequently is not narrowly tailored to accomplish that goal. *See Shaw*, ___ U.S. at ___, 113 S.Ct. at 2831.
>
> * * *
>
> [T]he North Carolina General Assembly here failed to utilize more conventional district shapes that, if not inherently "race neutral," at least would have been more likely to have been perceived as such by the voters. After all, "reapportionment is one area in which appearances do matter." *Id.* at ___, 113 S.Ct. at 2827. Again, where it is clear that a grossly disfigured majority-minority district poses dangers qualitatively distinct from those posed by a compact majority-minority district, the extent to which a redistricting plan *reflects* the use of race should have a significant bearing on our analysis. The very purpose of narrow tailoring, of course, is to promote the accomplishment of the remedy at *minimum* expense to other important interests, including contiguity and compactness. Where, as here, the State completely disregards less offensive alternatives in favor of a redistricting plan as contorted as the one presently before us, I find it difficult to characterize such a plan as "narrowly tailored."

Id. at 143a-44a.

B. The Challenged Redistricting Plan is Not of Limited Duration

The district court also held that Chapter 7 "is a remedial measure of limited duration, which will automatically expire at the end of the ten-year redistricting cycle . . ." A decade-long "remedy" is not, by definition, a limited remedy.

The "right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964). "The loss of [individual] freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976).

V. THE DISTRICT COURT ERRED IN IMPOSING A BURDEN OF PROOF UPON PLAINTIFFS REQUIRING DISPROOF OF ALL JUSTIFICATIONS ADVANCED BY THE STATE

The parties initially disagreed about the allocation of the burden of proof in this case. Plaintiffs and plaintiff-intervenors conceded that they had the burden of proving the plan was a racial gerrymander subject to strict scrutiny, after which point the burden must shift to the State to prove that the plan is narrowly tailored to further a compelling governmental interest. App. C at 42a.

The district court concluded that the *plaintiffs* have the burden of showing not only that the plan is a racial gerrymander, but that it is not narrowly tailored to further a compelling State interest. This reading of the parties' respective burdens of evidentiary production is erroneous. The district court relied on *Wygant* v. *Jackson Bd. of Education*, 476 U.S. 267 (1986), a reverse discrimination case, for this proposition. App. C at 42a-43a.

Wygant demonstrates that, once the plaintiffs have met their low initial burden of demonstrating that the plan imposes a race-based classification, the *defendants* then have the burden of producing evidence that remedial action was appropriate. *See Wygant*, 476 U.S. at 277; *id.* at 293, (O'Connor, J., concurring). Only *after* the defendants show a "strong basis in evidence" that the plan was narrowly tailored to further a compelling State interest have defendants created a "competing inference." *See Hays*, 839 F.

Supp. 1188, 1198 n. 25(W.D.La. 1993) *vacated*, ___ U.S. ___, 114 S.Ct. 2731 (1994).[9] *See also Wygant*, 106 S.Ct. at 1857.[10]

By contrast, the district court concluded that "Nothing in *Shaw* purports to alter these well-settled principles of Equal Protection jurisprudence." App. C at 43a. Appellants suggest that this is a misreading of *Shaw*, which notes that the *State* must have a "strong basis in evidence for concluding that remedial action [is] necessary." *Shaw*, ___ U.S. at ___, 113 S.Ct. at 2832 (emphasis added) (quoting *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500 (1989).

As this Court concluded in *Shaw:*

> Today we hold only that appellants have stated a claim under the Equal Protection Clause by *alleging* that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into

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[9] The *Hays* court, in an analysis urged by the plaintiff-intervenors, characterized the relative burdens thusly:

> To clarify this minuet further, if a plaintiff comes into court with a map bearing hideously contorted districts and evidence that the state legislature drew those districts on the basis of race, and if the plaintiffs complains that those districts lack a non-racial explanation — i.e., cannot be explained or understood without hypothesizing racial gerrymandering — then the plaintiff has stated a prima facie case under *Shaw*. If the state then introduces evidence that tends to show that the legislature was actuated by other motives that can explain the bizarre contours of the districts without resorting to race, the state has created a competing inference. The factfinder must then decide, on the basis of all available evidence, who is right." *Id.*

Hays, 839 F. Supp. at 1198 n. 25.

[10] Giving the State and the United States every benefit of the doubt, perhaps they merely confuse *Wygant's* statement of a truism — that plaintiffs in civil cases must always prove their case. Appellants accomplished that here by proving a racial gerrymander.

> separate voting districts because of their race, and that the separation lacks sufficient justification.

___ U.S. at ___, 113 S.Ct. at 2832. (Emphasis added).

However, that sentence is followed by the following:

> If the *allegation* of racial gerrymandering remains uncontradicted, the District Court further must determine whether the North Carolina plan is narrowly tailored to further a compelling governmental interest.

Id. (Emphasis added).

Clearly, these two sentences, coming in the last paragraph of the opinion and referring only to the *allegations* necessary to state a claim do not disturb the parties' respective burdens of persuasion, and which the Court established in *Croson*, *supra*, and *Wygant*, *supra*.

Furthermore, the fact that the district court afforded legislative privilege to the members of the General Assembly and their staffs — a privilege invoked by key participants in the creation of Chapter 7 — rendered plaintiffs' ability to meet the district court's burden an impossibility.

VI. THE STATE'S PURPORTED "COMPELLING INTERESTS" AND "JUSTIFICATIONS" WERE PRETEXTUAL AND EX POST FACTO

In addition to the use of the Voting Rights Act as a purported compelling State interest, the State argued — and the district court agreed — that the legislature intended to create one predominantly rural (first) and one predominantly urban (twelfth) district, and concomitantly, two districts with distinctly and internally homogenous commonalties of interest.

However, the parties below stipulated that the redistricting computer database did not contain any demographic information concerning income, education, type of employment, health care data, commuter patterns, or any other type of economic, sociological or historical data. Stipulation 34.

The only criteria adopted to guide the General Assembly in developing congressional districts were the following:

> (a) In accordance with the requirements of the Article I, Section 2 of the United States Constitution, congressional districts shall be drawn so as to be as nearly equal in population as practicable, the ideal district being 552,386.
>
> (b) In accordance with the Voting Rights Act of 1965, as amended, and the 14th and 15th Amendments to the United States Constitution, the voting rights of racial minorities shall not be abridged or denied in the formation of congressional districts.
>
> (c) All congressional districts shall be single member districts, as required by 2 U.S.C. § 2c, and shall consist of contiguous territory.
>
> (d) It is desirable to retain the integrity of precincts. . . .
>
> (e) Census blocks shall not be divided except to the extent that they were divided in the automated redistricting system database for precinct boundaries or to show previous districts.

Stipulation 43; Exhibit 9.

At no time during the redistricting process did the General Assembly amend or supplement these criteria, particularly with reference to the desirability of urban or rural districts. Instead, the evidence of the "homogeneity" of these rural and urban districts was developed by the state's expert witness, Dr. Allan Lichtman. App. C at 104a.

Plaintiffs and plaintiff-intervenors strongly objected to Dr. Lichtman's conclusions, because they were based upon demographic data produced by the U.S. Bureau of the Census well after the passage of Chapter 7. These data used to demonstrate the relative urbanness and ruralness of the districts in question could not have been used by the legislature — or anyone else — as a compelling justification for chapter 7 at the time it was debated and adopted.[11]

VII. THE DISTRICT COURT'S LEGAL AND FACTUAL ANALYSES ARE AT ODDS WITH THE RECORD AND ARE CLEARLY ERRONEOUS

Notwithstanding the deference usually afforded to findings of the court below with respect to facts and credibility, the district court's opinion contains numerous factual errors and misstatements which served in part as the bases for its legal conclusions.

While the majority's opinion contains dozens of such errors and misstatements which appellants maintain would affect the court's legal conclusions, a representative sample is set forth below:

The majority states that it "must assume" that the legislature was familiar with certain demographic information, App. C at 82a, an assumption necessary for the majority to reach its conclusion because, as noted *infra*, such demographic data was not available to the General Assembly at the time Chapter 7 was enacted.

The court found that North Carolina's black population exists in "major, discrete concentrations," App. C. at 83a, despite a record that demonstrated that the black population is not only dispersed, but also too dispersed to create even one compact, majority black district. If fact, this Court noted in its opinion in

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[11] When Dr. Lichtman attempted to utilize a similar analysis in *Hays* v. *State of Louisiana*, the district court there correctly characterized such justifications as "statistical legerdemain" and "spurious." *Id.* at 1203 n 48.

Shaw v. *Reno*, ___ U.S. at ___, 113 S.Ct. at 2820 that North Carolina's black population is "relatively dispersed."

The district court also admitted that the First and Twelfth Congressional Districts are geographically non-compact by any objective standard, and are in fact among the least compact ever created. App. C at 102a. The court further admits that they are not the two most geographically compact remedial district that could have been drawn, as evidenced by the alternatives introduced by the plaintiff-intervenors. *Id.* These admissions should have been fatal to the court's legal conclusion that the challenged districts were "narrowly tailored" to achieve their remedial purpose.

Perhaps most significantly, the district court determined that it was "[b]eyond any question" that the "dominant concern" of the legislature in deciding to enact Chapter 7 was a perception that any fewer than two majority black districts would be a violation of the Voting Rights Act. App. C at 90a. In fact, prominent Democratic legislators — both before, during and after the enactment of Chapter 7 — violently protested that the Voting Rights Act required no such thing. Trial Exhibits 25, 40, 41, 200 at 912, 914.

While not an exhaustive listing of the district court's erroneous findings and conclusions, they are, in dissenting Judge Voorhees' words, "material to a sound resolution of this case." App. D at 156a.

VIII. THE DISTRICT COURT'S INTERPRETATION OF *SHAW* STANDS IN SHARP CONTRAST TO THE HOLDINGS OF EVERY OTHER COURT WHICH HAS APPLIED THIS COURT'S DECISION IN STATEWIDE REDISTRICTING

The decision of the three-judge court below stands in stark contrast to the decisions and rationale of every other panel which has considered statewide racial redistricting plans since this Court's ruling in *Shaw*. *See Hays* v. *State of Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993) *vacated*, ___ U.S. ___, 114 S.Ct. 2731 (1994);

Johnson v. *Miller*, ___ F. Supp. ___, 1994 U.S. Dist. LEXIS 13043 (No. 194-008) (S.D. Ga. Sept. 12, 1994), *stay granted* ___ U.S. ___, 115 S.Ct. 36 (1994); *Vera* v. *Richards*, ___ F. Supp. ___, 1994 U.S. Dist. LEXIS 12368 (No. H-94-0277) (S.D. Tex. Aug. 17, 1994); *see also Marylanders for Fair Representation, Inc.* v. *Schaefer*, 849 F. Supp. 1002 (D. Md. 1994).

Appellants suggest that, in light of the unusual nature and composition of three-judge district courts, this disparity in the application of *Shaw* is the functional equivalent of a dispute among the Circuits meriting this Court's plenary review.[12]

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

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[12] In addition, the three-judge court's erroneous interpretation of "narrow tailoring" appears to stand in contrast to the views of the Fourth Circuit — which includes North Carolina — as recently expressed in *Podberesky* v. *Kirwan*, ___ F. 2d ___, 1994 U.S. App. LEXIS 29943 (No. 93-2585) (4th Cir. Oct. 27, 1994).

Respectfully submitted,

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